Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Andrew Clarke, Brad Ellis, Michael Ennis,

applicants,

and

Air Canada Pilots Association,

respondent,

and

Air Canada,

employer.

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December 23, 2011

On May 30, 2011, Messrs. Andrew Clarke, Brad Ellis and Michael Ennis (the applicants) filed an application pursuant to section 18 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*), requesting that the Canada Industrial Relations Board (the Board) reconsider its decision in *Clarke*, 2011 CIRB LD 2560 (LD 2560) in which their complaint pursuant to section 37 of the *Code* was dismissed. On the evidence before it, in LD 2560, the Board was unable to find that the Air Canada Pilots Association (ACPA or the union) contravened section 37 of the *Code* when it refused to file grievances against their employer, Air Canada (the employer), challenging their impending terminations due to the mandatory retirement provision applicable to pilots at Air Canada.

A reconsideration panel of the Board composed of Ms. Louise Fecteau, Mr. William G. McMurray and Ms. Judith MacPherson, Q.C., Vice-Chairpersons, has considered the above-cited application for reconsideration.

Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all written submissions and accompanying material, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

These reasons for decision were written by Ms. Judith MacPherson, Q.C., Vice-Chairperson.

Counsel of Record

Mr. Raymond D. Hall for Messrs. Andrew Clarke, Brad Ellis and Michael Ennis;
Mr. Bruce A. Laughton, Q.C., for the Air Canada Pilots Association; and
Ms. Rachelle Henderson for Air Canada.

I–Background and Facts

[1] The facts have been set out in LD 2560 and only a brief summary is required. The applicants were working for the employer as pilots and were required to retire at 60 years of age due to provisions in their pension plan which had been incorporated into their collective agreement. Despite their March 3, 2011 requests to the union to file grievances contesting their impending mandatory retirement, ACPA refused to do so. In ACPA's view, their retirements were in accordance with the collective agreement and it advised the complainants that it would not treat them any differently than any other pilot who had retired pursuant to those provisions. Also, ACPA advised them that if they wanted to challenge the mandatory retirement provisions, they could file complaints with the Canadian Human Rights Commission (CHRC), as other pilots had already chosen to do. On March 11, 2011, the applicants filed a complaint under section 37 of the *Code* alleging that ACPA was in breach of its duty of fair representation, the complaint that resulted in LD 2560.

[2] Relevant to this application is the ongoing proceeding before the Canadian Human Rights Tribunal (CHRT) and the Federal Court relating to human rights complaints filed under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA) by two other Air Canada pilots (Messrs. Vilven and Kelly) whose employment with Air Canada had already been terminated pursuant to the mandatory retirement provision in place. In that CHRA complaint, the pilots Vilven and Kelly challenged the constitutional validity of the provisions of the CHRA that permit mandatory retirement and allege the collective agreement provision is a discriminatory practice that must be prohibited.

[3] At the time relevant to the applicants' complaint to the Board, the Federal Court had just issued a decision, on February 3, 2011 (see *Air Canada Pilots Association* v. *Kelly*, 2011 FC 120) which ruled on two issues in the Vilven and Kelly proceedings. It upheld the CHRT decision that section 15(1)(*c*) of the CHRA was in violation of the equality rights under the *Canadian Charter of Rights and Freedoms* (Part I of *The Constitution Act, 1982*) (the *Charter*) and not saved by the section 1 justification analysis. Accordingly, it ruled that the mandatory retirement provision of the collective agreement governing the pilots was invalid and of no force or effect as it pertained to the determination of the human rights complaints of Vilven and Kelly. The second ruling was that the CHRT had unreasonably decided that age was not a *bona fide* occupational requirement (BFOR) for pilots on the basis of the evidence presented concerning the post-November 2006 time frame. It thus returned the issue of BFOR to the CHRT for re-determination on that issue.

[4] In the instant application, the applicants allege that the Board made errors of law or policy that cast serious doubt on its interpretation of the *Code*.

II–Positions of the Parties

A–The Applicants

[5] The applicants argue that the Board was unaware that the facts underlying the CHRT and the Federal Court decisions with respect to the issue of the defence to the mandatory retirement provision in the Vilven and Kelly proceedings were different from those affecting the applicants'

complaint. The applicants submit that the Board erred in law when it allowed the issue of BFOR in the Vilven and Kelly proceedings to bear any weight in its consideration of the applicant's complaint before it in LD 2560.

[6] As well, the applicants submit the Board erred in law by failing to properly construe the determinations of the CHRT in *Vilven* v. *Air Canada*, 2009 CHRT 24, and the Federal Court in *Air Canada Pilots Association* v. *Kelly*, *supra*, on the constitutional validity of the mandatory retirement provision in the collective agreement and pension plan between the employer and the union. According to the applicants, the Board incorrectly assumed that the mandatory retirement provision was valid, when it was not, and consequently, all of the Board's subsequent analysis and conclusions were in error.

[7] Finally, the applicants argue that the Board erred in policy in its interpretation and application of section 37 to the complaint before it by failing to fully consider and address:

> a) the union's failure to consider the applicants' request for a grievance regarding their impending unlawful termination of employment;
> b) the adverse consequences to the applicants resulting from the union's failure to fairly represent them with respect to their termination; and
> c) the union's choice not to represent any member who opposed mandatory retirement, including the applicants, and to support litigation by the employer to defend the termination of employment of union members.

[8] The applicants allege that the Board's errors cast serious doubt on the interpretation of the *Code* in the circumstances of their complaint. The applicants request that the Board reconsider LD2560 and order ACPA to file a grievance on their behalf to have the issue of their terminations addressed before an arbitrator.

B–The Union

[9] The union submits that the applicants allege facts and legal issues that were not raised in the original complaint and that were not "new" or unknown to the applicants at the time of filing their complaint. It argues that this is contrary to the Board's policy on reconsiderations. The union further submits that the applicants were aware of ACPA's position that neither the CHRT nor the Court had finally decided that the mandatory retirement provisions of the collective agreement were not a BFOR and the applicants are simply re-arguing their case in this application.

[10] The union submits that, contrary to the applicants' allegations, it considered that the BFOR issue for pilots was a "live issue." The union submits that it reasonably considered the factual and legal landscape at the relevant time in deciding not to advance the grievances. The union argues that the Federal Court overturned the CHRT's finding that the employer had not demonstrated that age was a BFOR for pilots, remitting the issue to the CHRT for re-determination. Therefore, the union submits that the Board was correct in concluding that the union's position was not contrary to section 37 of the *Code*.

[11] Further, the union submits that it does not violate section 37 of the *Code* when it is required to choose between opposing interests of its members, providing its motives in so doing are not arbitrary, discriminatory or in bad faith. The union argues that it did not do so in this matter.

[12] The union also urges the Board to reject the applicants' contention that the Federal Court has ruled that the provisions of the collective agreement and the pension plan are unconstitutional, as neither the employer nor the union are subject to the *Charter* which does not apply to non-governmental corporations or societies, citing *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229.

[13] The union argues that the applicants have not met the burden of proving that there are serious reasons or exceptional circumstances that would justify a reconsideration of LD 2560. The union submits that the application should therefore be dismissed.

C–The Employer

[14] Although the employer was afforded the opportunity to file submissions regarding this matter, it did not do so.

III–Analysis and Decision

[15] Section 18 of the *Code* provides the Board with the discretion to "review, rescind, amend, alter or vary" its orders or decisions. However, reconsideration of a decision is the exception, not the rule. Board decisions are intended to be final (see *Kies*, 2008 CIRB 413).

[16] The *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) set out grounds upon which a reconsideration application may be made that:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
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> (*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
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> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
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> (*c*) a failure of the Board to respect a principle of natural justice; and
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> (*d*) a decision made by a Registrar under section 3.

[17] An applicant has the onus to present serious reasons or exceptional circumstances justifying reconsideration of a decision (see *Canadian Imperial Bank of Commerce*, 2008 CIRB 403). Notably, the Board's limited reconsideration powers are not intended to allow for an appeal of the Board's original decision, nor for a party to re-argue the same issues presented before another panel of the Board, nor for a party to contest facts and issues already determined by the Board. The role of a reconsideration panel is not to substitute its own appreciation of the facts for that of the panel that was seized of the matter being reconsidered (see *Williams* v. *Teamsters Local Union 938*, 2005 FCA 302). Moreover, on reconsideration, the Board will not consider facts or issues which were not put before the original panel but were known to the party.

[18] The essence of the applicants' argument is the assertion that the Board, in LD 2560, began its consideration and analysis of the complaint before it, with the wrong premise. According to the applicants, the Board incorrectly assumed or concluded that, at the time relevant to the complaint before it, the mandatory retirement provision in the pension plan and collective agreement between Air Canada and ACPA was valid and enforceable. The applicants allege that, because of this initial error, the Board's whole analysis of the complaint was flawed and led the Board to an incorrect conclusion on the merits and thus to improperly dismiss the complaint.

[19] In support of this argument, the applicants first raise the issue of the BFOR defence. They argue that the Board improperly considered and was influenced by the ongoing proceedings of Vilven and Kelly before the CHRT and the Federal Court, to conclude that the issue of BFOR was still a live issue in the determination of the validity of the mandatory retirement provision in place at Air Canada. They submit that those proceedings are based upon different facts and evidence, such that the ruling would not be determinative of the applicants' circumstances. The applicants submit that the issue of BFOR is in progress in another ongoing proceeding before the CHRT with different evidence presented to the effect that the international restrictions on over age 60 pilots had been reduced since the Vilven and Kelly evidence was presented, and for which a decision has yet to be rendered.

[20] This submission, however, in the Board's view, serves to highlight the fact that the issue was indeed alive at the time of the initial complaint. In LD 2560, the Board described the then current state of the law as it related to the validity of the mandatory retirement provision for Air Canada pilots, as follows:

> It must be noted that the union's refusal to file a grievance on the complainants' behalf was taken after the Federal Court's decision in *Air Canada Pilots Association* v. *Kelly*, 2011 FC 120, was issued on February 3, 2011. That decision remitted a portion of the CHRT's 2009 decision in the Vilven and Kelly case back to the CHRT for redetermination on the question of whether being under age 60 is a *bona fide* occupational requirement for pilots after November 2006. In its decision, the Federal Court upheld the CHRT's refusal to order Air Canada and ACPA to cease applying the mandatory retirement provisions of the collective agreement and the pension plan to all pilots. The Federal Court also refused to issue a general declaration of invalidity itself.

> Consequently, at the time that ACPA refused to process the complainants' grievances, the question of whether being under age 60 is a *bona fide* occupational requirement for pilots was still very much a live issue.
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> (page 6)

[21] The complaint was filed in March, 2011 and LD 2560 was issued in May, 2011. A reading of the Federal Court's decision in *Air Canada Pilots Association* v. *Kelly*, *supra*, confirms the Board's description above, as being an accurate account. In that decision of February 3, 2011, the Federal Court concluded that:

> [491] The Tribunal's finding that Air Canada had not established that being under the age of 60 was a *bona fide* occupational requirement for its airline pilots at the time that Messrs. Vilven and Kelly's employment was terminated in 2003 and 2005 respectively was reasonable. However, the Tribunal's finding that Air Canada had not established that age was a *bona fide* occupational requirement for its pilots in light of the post-November 2006 ICAO standards was not reasonable.
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> [492] As result, Air Canada's application for judicial review as it relates to the *bona fide* occupational requirement issue will be allowed in part. The question of whether Air Canada has established that age was a *bona fide* occupational requirement for its airline pilots after November of 2006 is remitted to the same panel of the Tribunal, if available, for re-determination on the basis of the existing record, in light of all three elements of the Meiorin test.

[22] The CHRT had not rendered its subsequent decision on the issue prior to the time that the circumstances of the complaint in this matter came to be. The issue was thus a live issue in respect of the complaints of Vilven and Kelly.

[23] Even if it were accepted that the finding in the Vilven and Kelly proceedings would not be directly applicable to the applicants because of the existence of a different fact scenario (a question that is not before this Board), the fact remains that, at the time ACPA made its decision to decline to take the applicants' grievances forward, there had been no definitive answer from either the CHRT or the Federal Court, on any evidentiary record, on the question of whether age was a BFOR for Air Canada pilots after November 2006. The applicants raise the fact that another proceeding was ongoing, based upon a different evidentiary record in which no decision had been rendered. This fact only reinforces that the issue was still a live issue for Air Canada pilots. Accordingly, the Board sees no error of law having been made in LD 2560 on that basis.

[24] The second issue raised in support of their argument is the "binding" nature of the outcome of the *Charter* challenge to the mandatory retirement provisions of the CHRA in the Vilven and Kelly proceedings. The applicants argue that the Board, in LD 2560, erred when it determined the applicants' complaint on the assumption that, at the time, the mandatory retirement provision in the collective agreement was valid and enforceable as it concerned the other members of the bargaining unit, except Vilven and Kelly. They assert that the determination of the Federal Court that the mandatory retirement provision was of no force or effect, applied to all members of the bargaining unit, not just Vilven and Kelly, because section 56 of the *Code* provides that a collective agreement is binding upon every employee in the bargaining unit. They assert that a collective agreement provision cannot be declared of no force or effect for some employees, but not for all.

[25] The Board does not agree that the determination of constitutional invalidity applied to all members of the bargaining unit. In that case, the Court was specifically asked for a declaration that paragraph 15(1)(*c*) of the CHRA is inconsistent with the *Charter* and is of no force or effect. In other words, a general declaration of invalidity that would have universal application was requested. Messrs. Vilven and Kelly asked for that remedial relief because the CHRT had already refused their request to order Air Canada and ACPA to cease applying the mandatory retirement provision to all Air Canada pilots on the basis that it did not have the power to make a general declaration of legislative invalidity. The Court considered this request and explicitly declined to issue such a general declaration, for a variety of reasons. First, it questioned, without deciding, its remedial authority to grant declaratory relief to a respondent in a judicial review proceeding. It further opined that even if it had such authority, it would be inappropriate to do so in that case. Such relief would amount to a collateral attack on the remedial decision of the CHRT, a different decision than the one before it under review, and it would have been made without the benefit of participation by the Attorneys General who would not reasonably have anticipated the request. The Court's reasoning was as follows:

> [473] Shortly before the hearing of these applications for judicial review, Messrs. Vilven and Kelly brought a motion for leave to amend their memorandum of fact and law. They sought to include a request for a declaration that paragraph 15(1)(*c*) of the *CHRA* is inconsistent with the *Charter* and is of no force and effect by operation of subsection 52(1) of the *Constitution Act, 1982*.

[474] Messrs. Vilven and Kelly say that since the commencement of the human rights proceedings, they have sought an order directing Air Canada to cease applying the mandatory retirement provisions of the pension plan and collective agreement to all Air Canada pilots.

...

[479] The constitutional remedies available to administrative tribunals (including the Canadian Human Rights Tribunal) are limited. Tribunals do not have the power to grant general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* will not be binding on future decision-makers: see *Nova Scotia (Workers' Compensation Board) v. Martin*, at para. 31.

[480] This Court clearly possesses the jurisdiction to hear constitutional challenges in the context of applications for judicial review, and to grant declaratory relief in that regard: see *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341, [1999] F.C.J. No. 1864, (F.C.A.), and *Giwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404, [1999] F.C.J. No. 792 (F.C.A.). It should be noted, however, that in both of these cases it was the *applicant* who was seeking the declaratory relief.

[481] The Court's power to grant declaratory relief is predicated upon there first being a finding that the tribunal in question erred in one of the ways identified in section 18.1(4) of the *Federal Courts Act*. This provision states that the Federal Court may grant relief (including declaratory relief) if it is satisfied that the federal board, commission or other tribunal erred.

[482] I have concluded that the Tribunal did not err in finding that paragraph 15(1)(*c*) of the *CHRA* is not saved by section 1 of the *Charter*. Consequently, the remedial powers conferred on the Court by subsection 18.1(3) of the *Federal Courts Act* are not engaged. The proper remedy is for the Court to dismiss Air Canada and ACPA's applications for judicial review insofar as they relate to the *Charter* issue.

[483] Messrs. Vilven and Kelly argue that despite the wording of section 18.1 of the *Federal Courts Act*, this Court nevertheless has the power to grant a general declaration of invalidity with respect to paragraph 15(1)(*c*) of the *CHRA* under subsection 52(1) of the *Charter*. Subsection 52(1) states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." They have not, however, identified a single case where declaratory relief, whether constitutional or otherwise, has been granted to a *respondent* on an application for judicial review.

[484] Assuming, without deciding, that such a constitutional remedy could ever be granted to a responding party on an application for judicial review such as this, there are two reasons why I do not think it appropriate to do so here.

[485] The first is that what Messrs. Vilven and Kelly are really trying is to do is to mount a collateral attack on the Tribunal's remedial decision. That decision is not before me. If the respondents are not content with the remedies that were granted by the Tribunal, it is open to them to seek judicial review of the Tribunal's remedial decision.

[486] The second reason that I would decline to grant such relief is that although the federal and provincial Attorneys General would have been aware that constitutional validity of paragraph 15(1)(*c*) of the *CHRA* was at issue in this proceeding by virtue of the Notice of Constitutional Question served by ACPA, this Notice was served in the context of applications for judicial review brought by ACPA and Air Canada, and not by Messrs. Vilven and Kelly.

[487] In these circumstances, I do not believe that the Attorneys General could reasonably have anticipated that Messrs. Vilven and Kelly would be seeking a general declaration of invalidity with

> respect to paragraph 15(1)(*c*) of the *CHRA*. This is especially so in light of the fact that there was no reference to such relief being sought in Messrs. Vilven and Kelly's memorandum of fact and law.
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> [488] A general declaration of invalidity could potentially have widespread implications for many federally-regulated workplaces. Had the Attorneys General been aware that such relief was being sought by the respondents, it could well have affected their decisions as to whether or not to participate in this proceeding. It is entirely possible that one or more Attorneys General may have wished to make submissions, either with respect to the constitutional validity of the legislation generally, or as to whether any declaratory order should provide for a period of suspension and what that period should be.

[26] It stands to reason then, that the effect of the Federal Court's decision was a declaration that the mandatory retirement provision for the pilots at Air Canada was declared invalid and of no force or effect for the sole purpose of determining the discrimination complaints of Vilven and Kelly.

[27] In the Board's view, section 56 of the *Code* has no bearing on this determination of the Court. Section 56 provides:

> 56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer.

[28] The general purpose of section 56 is to confirm the binding nature of the collective agreement, during its term, once it has been negotiated and entered into by the parties to the certification order issued by the Board. For example, it confirms the collective nature of the relationship in the workplace and thereby prohibits the negotiation of individual contracts of employment. Further, it prevents employers from attempting to negotiate a different collective agreement with a different bargaining agent while an agreement is in force.

[29] As noted by the applicants, however, there are exceptions to this general rule of one collective agreement only, as set out by section 56. For example, different provisions of various different collective agreements may apply to certain individual employees following a consolidation of two or more bargaining units into a single unit. There may be a time lag where the various agreements will continue to apply until the parties are able to negotiate a single collective agreement for the newly consolidated unit. Furthermore, where the status or legality of a particular provision of a collective agreement is in dispute, the provision will be considered to be valid and enforceable in its general application, unless and until it is determined to be otherwise. Section 56 of the *Code* does

not expressly prevent a particular provision of a collective agreement from having some limited application. The Board is of the view that section 56 was not intended to have the effect advocated by the applicants, nor should it be interpreted and applied so as to override an express determination of both the CHRT and the Federal Court.

[30] In light of the above, the Board concludes that there was no error in LD 2560 as a result of the finding that the state of the law at the relevant time of the applicants' complaint and the union's decision not to process their grievances, was that the mandatory retirement provision contained in the collective agreement for the pilots was still valid and enforceable in its general application. Consequently, there was no error in ruling that ACPA had not violated its duty of fair representation when it took the considered position at that time, that it was not prepared to treat the applicants any differently than those pilots who had already retired and declined to process the applicants' grievances challenging that provision of the collective agreement.

[31] In any event, and as noted by both the CHRT and the Federal Court, for the mandatory retirement provision to be discriminatory, and thus invalid and/or unenforceable, it must be found to violate both sections 15(1)(*a*) and 15(1)(*c*) of the CHRA. In other words, even if there was a finding of constitutional invalidity, the provision may still be valid and enforceable for the pilots if it is established that age is a BFOR.

[32] Finally, the applicants argue that because the Board approached the matter with the incorrect premise that the mandatory retirement provision was valid and effective at the relevant time, it failed to assess the facts and to conduct the necessary examination of the union's conduct and its consequences in the particular circumstances: the union's failure to seriously consider the grievance in light of its duty of fair representation obligations; the serious consequences to the complainants of not challenging their impending termination; and, the effect of the union's conscious choice to favour one group of bargaining unit employees over another.

[33] In the Board's view, much of the applicants' argument on this issue involves a re-arguing of the complaint on its merits and, as indicated previously, this is not open to the applicants on an application for reconsideration. Nevertheless, the Board is satisfied that the Board, in LD 2560,

conducted its assessment of the union's conduct in accordance with the applicable test, applying the appropriate criteria and considerations, including the underlying policy objectives of section 37 of the *Code*, as described in the Board's jurisprudence (see *McRae/Jackson*, 2004 CIRB 290). This is reflected in its reasons as follows:

> The Board's jurisprudence has consistently emphasized the limited role the Board has in applying this provision. In particular, the Board does not determine whether the union made the "right" decision, simply whether it made its decision in a manner that was free of arbitrariness, discrimination or bad faith towards the complainant. In other words, the Board requires that a union act in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee and the legitimate interests of the union (see *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509 at page 527).
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> ...
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> In this case, ACPA made it clear to each of the complainants that its position was that retirement at age 60 was in accordance with the provisions of the collective agreement and the pilots' pension plan, and that this position has been applied consistently with respect to all pilots who have retired from Air Canada. ACPA took the considered position that it was not prepared to treat the complainants any differently than those pilots.
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> ...
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> The Board is satisfied that ACPA's consideration of the complainants' grievances, and its decision as to how it should proceed, were not taken arbitrarily or in bad faith. The union is not obliged to agree with the grievors' challenge to a provision of the collective agreement, which currently permits discrimination based on age. Unless and until the CHRT and/or the Federal Court rule that the mandatory retirement provision in the collective agreement and the pilots' pension plan are invalid, it is not a violation of section 37 of the *Code* for ACPA to refuse to file grievances challenging that provision of the collective agreement.
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> (pages 4 and 6)

[34] In dismissing the complaint in LD 2560, the Board also found that the union was not acting in a discriminatory manner under section 37 of the *Code* when it chose to defend the position of one group of pilots over another. Unions have a right and are often required to choose between opposing interests within the bargaining unit and are also entitled to consider the legitimate interests of the bargaining unit as a whole, providing they do not do so with arbitrary, discriminatory or bad faith motives (see *Blacklock*, 2001 CIRB 139; and *Buchanan*, 2006 CIRB 348). In such cases, it is the motives of the union that are to be assessed. In LD 2560, the Board found that the union had taken a "considered position" in refusing to process the applicants' grievances at that time, and did not do so for arbitrary, discriminatory or bad faith motives.

[35] Consequently, the Board determines that the applicants have not raised any valid grounds for reconsideration, including any falling within sections 44(*a*), (*b*) or (*c*) of the *Regulations*. The Board finds that the applicants have not established any error of law that casts serious doubt on the interpretation of the *Code* in the Board's legal reasoning or construction of the then current state of the law governing the issue of mandatory retirement for pilots at Air Canada. In the Board's view, the applicants are seeking a reconsideration of LD2560 by largely re-stating the case they put before the original panel and do not disclose any error of law or circumstance which would warrant the Board's exercise of its discretion to reconsider LD 2560.

[36] Accordingly, the application for reconsideration is dismissed.

[37] This is a unanimous decision of the Board.

Judith MacPherson, Q.C.
Vice-Chairperson

Louise Fecteau
Vice-Chairperson

William G. McMurray
Vice-Chairperson